IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 25, 2007

IN RE CONSERVATORSHIP OF CHADWICK

Appeal from the Probate Court for Roane County
No. GC-696 Jeffery H. Wicks, Judge

No. E2006-02544-COA-R3-CV - FILED MARCH 27, 2008

Kelley Narramore and Sandra Crabtree (collectively "the petitioners") are cousins of Lorilee Chadwick ("the ward"). The petitioners filed a petition seeking to be appointed conservators of the ward. The ward's father, Billy N. Chadwick ("Father"), opposed the petition. The trial court granted the petition and named the petitioners co-conservators. Father appeals, challenging the propriety of their appointment. We lack an adequate factual record, and therefore the trial court's factual findings are conclusively presumed to be correct. Furthermore, we do not find the absence from the record of a written report from the guardian ad litem to constitute a reversible error. Accordingly, we affirm the court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Billy N. Chadwick, Kingston, Tennessee, appellant, *Pro Se.*

No brief filed on behalf of the appellees, Kelley Narramore and Sandra Crabtree.

OPINION

We are unable to reach the issues presented by Father's appeal because he has failed to provide us with a transcript or statement of the evidence as required by Tenn. R. App. P. 24. Father makes various assertions of fact in his brief, but "the recitation of facts and argument contained in a brief submitted to this Court . . . are not evidence. . . . [and] can[not] be considered in lieu of a verbatim transcript or statement of the evidence and proceedings." ***State v. Draper***, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990). We simply cannot assume that the facts as recited by Father are true. Well-established law does not permit us to receive the facts in this manner.

Father ostensibly attempted to meet the requirements of Tenn. R. App. P. 24 by submitting to the trial court a statement of the evidence, but the document he submitted was rejected by the trial court on the ground that it "is not a fair, accurate and complete account of the hearing" in question. We have reviewed the submitted document and note that it is extremely argumentative and one-sided – for instance, it accuses the petitioners of perjury and "sharp practices," and accuses the guardian ad litem of concealing information and breaching her fiduciary duties. Moreover, the trial court's order appointing the petitioners as co-conservators indicates that the court relied in part upon "the sworn testimony of witnesses examined in open Court," yet Father's "statement of evidence" recounts none of this testimony. In fact, it mentions various out-of-court actions and discussions prior to the hearing, yet recites nothing that transpired at the actual hearing except for a "verbal discourse" between Father and the guardian ad litem, and another such "discourse" between Father and the trial judge. Far from being a full account of the hearing that could substitute for a verbatim transcript, it is an advocacy document. Indeed, much of the purported "statement of evidence" is repeated almost verbatim in Father's brief. In any event, the submitted document is not in any sense an adequate "statement of evidence" under Tenn. R. App. P. 24, and the trial court properly refused to include it in the record. Thus, we have no transcript or statement of evidence before us.

Generally, although a trial court's factual findings are presumed correct in our *de novo* review upon the record of the proceedings below, such findings will be set aside if the preponderance of the evidence is to the contrary. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). However, "[t]he burden is . . . on the appellant to provide the Court with a transcript of the evidence or a statement of the evidence from which this Court can determine if the evidence does preponderate for or against the findings of the trial court." ***Coakley v. Daniels***, 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992). As the Supreme Court has stated, "[w]hen a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." ***State v. Ballard***, 855 S.W.2d 557, 560 (Tenn. 1993). "Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue." ***Id.*** at 561. We have no choice but to conclusively presume that the trial court's factual findings are correct. Those recited findings support the trial court's conclusion to appoint the petitioners as co-conservators of the ward.

Under these circumstances, we may only reverse the decision below if we find, based upon the "technical" record before us, that the trial court committed an error of law. Father appears to argue that the court's order is legally erroneous because it refers to a "report of the Guardian ad Litem" even though no such written report exists in the record. However, without a transcript or statement of evidence, we have no way of knowing what the trial court was referring to when it mentioned the "report of the Guardian ad Litem." For all we know, the court may have been referencing an oral report. Father has failed to provide us with the necessary record to make such an assessment.

Father also argues that the guardian ad litem's apparent failure to file a *written* report violates Tenn. Code Ann. § 34-1-107(f), which requires that, in conservatorship proceedings such as this one, "[t]he guardian ad litem shall make a written report to the court at least three (3) days prior to the

date set for hearing the matter, which time period may be waived in the judge's discretion." We are cognizant of the principle that "[t]rial courts should be extremely hesitant to . . . excuse guardians ad litem from any of their statutory responsibilities." ***In re Conservatorship of Groves***, 109 S.W.3d 317, 345 n.116 (Tenn. Ct. App. 2003). Yet the harmless error rule still applies, and we are presented with nothing to persuade us that any error which may have occurred "more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b).

Father does not cite any case law, and we have found none, supporting the proposition that a guardian ad litem's failure to file a written report, in violation of Tenn. Code Ann. § 34-1-107(f), constitutes *per se* reversible error. Therefore, we believe reversal is appropriate only if the error altered the outcome of the case. In its order, the trial court indicates that its findings are based upon three different types of evidence: "the report of the Guardian ad Litem" – whatever that means – "the medical report of Dr. Charles E. Darling, Jr., [and] the sworn testimony of witnesses examined in open Court[.]" Because Father has failed to provide us with a transcript or statement of evidence, we cannot review the totality of the material relied upon by the court, and thus we cannot make a determination of whether reversible error occurred. Under these circumstances, we must presume that the court acted properly, and/or that any error was harmless.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Billy Chadwick. This case is remanded to the trial court for collection of costs assessed below, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE